

NATIONWIDE PERMIT 12 AND DOMESTIC OIL PIPELINES: AN INCOMPATIBLE RELATIONSHIP?

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Abstract: As climate change's momentum becomes increasingly more difficult to quell, environmentalists are litigating to stop oil pipeline expansion. Litigation over two recently completed oil pipelines—the Flanagan South and the Gulf Coast—illustrates the legal battle environmentalists face. Given the outcome of those cases, it may seem that environmentalists face insurmountable judicial precedent. But they are not out of options quite yet.

Although no statute expressly requires the federal government to conduct environmental analysis of proposed domestic oil pipelines, two statutes—the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA)—generally work in tandem to require the U.S. Army Corps of Engineers (Army Corps or Corps) to complete an analysis when a proposed pipeline crosses regulated waters. However, the Army Corps recently has begun using a general permit called Nationwide Permit 12 (NWP 12) to streamline the approval process by avoiding individual review of pipelines. The Tenth and District of Columbia Circuits upheld the Army Corps's use of NWP 12 in approving the Flanagan South and Gulf Coast pipelines, rejecting arguments that such use violates the CWA and NEPA. Not only did environmentalists lose both decisions, but the Army Corps also subsequently tightened its analysis to avoid potential future liability.

Despite these setbacks, this Note contends that the battle is not yet over. The Note argues that the Army Corps failed to comply with the CWA's plain meaning when it issued NWP 12, resulting in a limited opportunity for the public to participate. By limiting public comment, NWP 12 undermines the Corps's ability to take a hard look at the environmental consequences of proposed oil pipelines. If the agency cannot comply with the CWA's plain meaning, it can no longer use NWP 12 to avoid individual review of oil pipelines. Given recent judicial precedent, environmentalists face a difficult task. But hope remains. Under the framework first described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the circuit courts are improperly deferring to the Army Corps's interpretation of the CWA when the statute's meaning is clear. Judicial recognition and correction of this would be a victory for environmentalists, as it would increase federal environmental review of domestic oil pipelines and provide the public with a better opportunity to voice its concerns over the proliferation of oil pipelines in the United States.

INTRODUCTION

The U.S. is an energy glutton. Despite accounting for less than 5% of the world's population, the country consumes nearly 20% of the world's

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energy supply¹ and is the world's largest consumer of oil.² More than 2.5 million miles of oil and natural gas pipeline help satiate the high demand,³ and this number is increasing.⁴ As our opportunity to prevent climate change's most dire consequences recedes like a coastline in rising tides,⁵ environmentalists, in their fight against oil dependence, are fiercely opposing construction of new pipelines.⁶ In the courts, environmentalists have recently come up short.⁷

To provide context to the statutory and regulatory requirements concerning federal oil pipeline review and approval,⁸ this Note examines two heavily litigated domestic oil pipelines: TransCanada's Gulf Coast Pipeline (GC Pipeline) and Enbridge's Flanagan South Pipeline (FS Pipeline). The GC Pipeline transports oil nearly 500 miles from Cushing,

1. Meg Jacobs, *America's Never-Ending Oil Consumption*, ATLANTIC (May 15, 2016), <https://www.theatlantic.com/politics/archive/2016/05/american-oil-consumption/482532/> [<http://perma.cc/YNH7-ME6G>]; see also *What Is the United States' Share of World Energy Consumption?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.cfm?id=87&t=1> [<https://perma.cc/Z8HL-N7PP>] (the United States's share of world energy consumption is 18%).

2. Alex Kuzoian, *Animated Map Shows All the Major Oil and Gas Pipelines in the U.S.*, BUS. INSIDER (Dec. 9, 2015, 6:39 AM), <http://www.businessinsider.com/map-major-us-oil-gas-energy-pipelines-2015-12> [<http://perma.cc/C5NC-3ZCR>].

3. *Id.*

4. See, e.g., Steven Mufson & Juliet Eilperin, *Trump Seeks to Revive Dakota Access, Keystone XL Oil Pipelines*, WASH. POST (Jan. 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/01/24/trump-gives-green-light-to-dakota-access-keystone-xl-oil-pipelines/?utm_term=.aa1f812e443c [<http://perma.cc/4CS3-NHZL>] (reporting on President Trump's executive orders supporting the completion of the Dakota Access and Keystone XL oil pipelines).

5. See generally Christiana Figueres et al., *Three Years to Safeguard Our Climate*, 546 NATURE 593 (2017) (providing evidence that global leadership must make significant strides by 2020 to effectively combat climate change).

6. See, e.g., Andrew M. Harris & Jennifer A. Dlouhy, *Keystone XL Pipeline Block Sought to Undo Trump's Approval*, BLOOMBERG (Mar. 30, 2017, 10:13 AM), <https://www.bloomberg.com/news/articles/2017-03-30/keystone-xl-pipeline-comes-under-new-challenges-over-approval> [<http://perma.cc/L4AQ-EZZK>] (reporting on environmental groups' challenge to President Trump's approval of the Keystone XL pipeline).

7. See, e.g., *Sierra Club, Inc. v. Bostick (Bostick II)*, 787 F.3d 1043, 1061 (10th Cir. 2015) (rejecting environmentalists' challenges to the Gulf Coast Pipeline).

8. This Note focuses on domestic oil pipelines rather than transnational oil pipelines or natural gas pipelines. The federal approval process for domestic oil pipelines is less stringent than the approval process for natural gas pipelines. The Federal Energy Regulatory Commission must approve proposed natural gas pipelines, *Sierra Club, Inc. v. U.S. Army Corps of Eng'rs (Army Corps II)*, 803 F.3d 31, 50 n.8 (D.C. Cir. 2015), subjecting the entire pipeline to environmental review, *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 753 F.3d 1304, 1307 (D.C. Cir. 2014). Domestic oil pipelines, on the other hand, do not require comparable federal approval and are thus not expressly subject to whole-pipeline review. *Army Corps II*, 803 F.3d at 50. Domestic oil pipelines also differ from transnational oil pipelines in that the Secretary of State must approve transnational pipelines. See *id.* at 33 ("The U.S. Secretary of State must approve oil pipelines that cross international borders . . . but that requirement is inapplicable to wholly domestic pipelines.").

Oklahoma, to the Gulf Coast,⁹ crossing over 2000 regulated waters¹⁰ along its route.¹¹ The nearly 600-mile-long FS Pipeline is designed to ship approximately 600,000 barrels of oil per day from Illinois to Cushing, Oklahoma, where the oil is then directed to the Gulf Coast.¹² It, too, crosses roughly 2000 regulated waters.¹³

Although no specific statute expressly subjects domestic oil pipelines to whole-pipeline review and approval, two statutes create a regulatory scheme that generally serves to subject entire pipelines crossing regulated waters to review and approval.¹⁴ The Clean Water Act¹⁵ (CWA) requires the federal government to issue a permit for each segment of pipeline that crosses regulated waters.¹⁶ This, in turn, triggers the National Environmental Policy Act of 1969¹⁷ (NEPA), a federal statute that subjects federally issued permits to environmental review.¹⁸ An important aspect of environmental review under NEPA is its public-comment mandate, which serves to assist the federal government in making informed decisions.¹⁹ Environmental review of CWA permits is not limited to the permit itself but must also include the permit’s foreseeable effects—the completion of an oil pipeline, for example.²⁰ However, the Army Corps has evaded individualized environmental review by using Nationwide Permit 12 (NWP 12)—a type of CWA permit that approves all projects falling within its scope—as a tool to approve domestic oil pipelines.²¹ The Tenth and District of Columbia (D.C.) Circuits upheld this use of NWP 12 despite CWA and NEPA challenges brought by environmental groups.²²

9. *Sierra Club, Inc. v. Bostick (Bostick I)*, 539 F. App’x 885, 887 (10th Cir. 2013).

10. The Army Corps has jurisdiction over “all waters of the United States.” *Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley I)*, 410 F. Supp. 2d 450, 454–55 (S.D.W. Va. 2004), *aff’d in part, vacated in part*, 429 F.3d 493 (4th Cir. 2005). This Note refers to waters within the Corps’s jurisdiction as “regulated waters.”

11. *See Bostick II*, 787 F.3d at 1046.

12. *Army Corps II*, 803 F.3d at 35.

13. *Id.* at 33–34, 52.

14. *See, e.g., id.* at 33 (“[n]otwithstanding the absence of any general permitting requirement for domestic oil pipelines,” the Clean Water Act often triggers environmental review under NEPA).

15. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

16. *Army Corps II*, 803 F.3d at 38.

17. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370(h) (2012).

18. *Army Corps II*, 803 F.3d at 36.

19. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768–69 (2004).

20. *See* 40 C.F.R. § 1508.7 (2016) (defining “cumulative impact” under NEPA as the “incremental impact of the action when added to other past, present, and reasonably foreseeable future actions”).

21. *Army Corps II*, 803 F.3d at 38–40; *Bostick II*, 787 F.3d 1043, 1049–50 (10th Cir. 2015).

22. *See Army Corps II*, 803 F.3d at 34–35; *Bostick II*, 787 F.3d at 1061.

Part I of this Note introduces the CWA and NEPA, explaining how the two statutes can work in tandem to provide a regulatory scheme over oil pipelines where none might otherwise exist. It also explains the concept of general permitting. Part II first introduces NWP 12—a general permit designed to cover utility lines impacting less than a half-acre of regulated waters at each “separate and distant crossing.” The term “utility lines” encompasses oil pipelines. Part II also introduces the GC and FS pipelines. Part III discusses the recent litigation over the GC Pipeline in the Tenth Circuit and the FS Pipeline in the D.C. Circuit. Both Circuits upheld the Corps’s use of NWP 12 to approve pipelines.

Part IV argues that despite these rulings, the current use of NWP 12 in approving domestic oil pipelines violates the CWA’s plain meaning. The CWA requires the Army Corps to ensure that a general permit will have minimal cumulative adverse effects on the environment *before* issuing the permit, and the Army Corps failed to comply with this plain meaning when it reissued NWP 12. If the agency cannot comply with the CWA’s plain meaning, then it cannot use NWP 12 to avoid individual review of oil pipelines. However, under the framework first described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²³ courts are improperly deferring to the Army Corps’s interpretation of the CWA when the statute’s meaning is clear.²⁴ As a result, the Army Corps is able to evade hard-look review of domestic oil pipelines. In Part V, this Note concludes that although the Corps conducted more detailed NEPA analysis when reissuing NWP 12 in 2017, the general permit is still out of compliance with the CWA and is thus subject to meritorious legal challenges.

I. THE CWA AND NEPA COMBINE TO SUBJECT DOMESTIC OIL PIPELINES CROSSING REGULATED WATERS TO WHOLE-PIPELINE ENVIRONMENTAL REVIEW

While no statute requires an oil company to obtain a federal permit before constructing a domestic oil pipeline, if that pipeline crosses “waters of the United States,” the CWA requires the company to obtain a permit.²⁵ The need for a CWA permit triggers independent environmental review requirements under NEPA, which requires the federal government to analyze the probable environmental impact of major federal actions.²⁶

23. 467 U.S. 837 (1984).

24. *Id.* at 843–44.

25. *Army Corps II*, 803 F.3d at 38–40.

26. *Id.* at 36 (citing *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004)). Additionally,

Understanding how the two statutory schemes work in tandem requires a basic understanding of both.

A. *The Clean Water Act*

The CWA's objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²⁷ The Act sets out to accomplish this objective "by prohibiting the discharge of any pollutant, including dredged or fill material," into regulated waters.²⁸ This prohibition is not without exception. For example, the Army Corps may issue section 404 permits, which allow discharge of dredged or fill material into regulated waters.²⁹ The Corps may issue an individual permit for a single proposed project, or it may issue a general permit with the potential to cover multiple not-yet-proposed projects.³⁰ General permits are issued for up to five years on a state, regional, or nationwide basis,³¹ and they may be reissued upon expiration.³²

The CWA allows the Corps to issue general permits—and avoid individual permitting—under limited circumstances. The Corps may issue a general permit only if the permitted activities (1) "are similar in nature," (2) "will cause only minimal adverse environmental effects when performed separately," and (3) "will have only minimal cumulative adverse effect on the environment."³³ These three requirements are substantive limitations: the Corps may not issue a general permit if any of

the Bureau of Indian Affairs regulates "the granting of easements over Indian land," and "all federal agencies must consult with the [Fish and Wildlife Service] to ensure that 'any action authorized, funded, or carried out by such agency' is unlikely" to adversely affect endangered or threatened species or their habitat. *Sierra Club, Inc. v. U.S. Army Corps of Eng'rs (Army Corps I)*, 990 F. Supp. 2d 9, 15–16 (D.D.C. 2013). These federal schemes are not discussed in this Note.

27. Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2012).

28. *Army Corps I*, 990 F. Supp. 2d at 19.

29. 33 U.S.C. § 1344(a). These permits are often referred to as section 404 permits because what is now codified at 33 U.S.C. § 1344(a) was originally enacted in section 404 of the Federal Water Pollution Control Act Amendments of 1972. See Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 548 (2005). Meanwhile, the EPA issues permits for the "discharge of any pollutant." 33 U.S.C. § 1342; see also Murchison, *supra*, at 538 n.83. The difference between a "pollutant" and "dredged or fill material" is not always clear. See generally Kory R. Watson, *Fill Material Pollution Under the Clean Water Act: A Need for Legislative Change*, 35 S. ILL. U. L.J. 335 (2011).

30. See *Army Corps II*, 803 F.3d 31, 38 (D.C. Cir. 2015).

31. 33 U.S.C. § 1344(e).

32. *Army Corps I*, 990 F. Supp. 2d at 20.

33. 33 U.S.C. § 1344(e).

the three are not met.³⁴ Put another way, the Corps may not issue a general permit if the permit would authorize dissimilar projects or result in more than minimal adverse environmental effects on either an individual or cumulative basis.³⁵

The Corps did not always have the option to issue a general permit. Originally, the CWA only permitted the Corps to issue individual, or section 404(a), permits for the discharge of dredged or fill material.³⁶ The Corps viewed the lack of general permitting as an inconvenience³⁷ because individual permitting requires extensive, case-by-case review for each qualifying project.³⁸ Moreover, in 1975, a district court held that the Corps's CWA jurisdiction was quite broad.³⁹ In *Natural Resources Defense Council, Inc. v. Callaway*,⁴⁰ the court ordered the Corps to “[p]ublish . . . regulations clearly recognizing the full regulatory mandate of the [CWA],” which, the court found, extended to all the nation’s waters “to the maximum extent permissible under the Commerce Clause.”⁴¹ Because the Army Corps issues discharge permits,⁴² the broader its jurisdiction, the more permit applications it must consider. Thus, the Corps opposed this broad interpretation of its jurisdiction, expressing concern that the decision would require it to issue individual permits to “the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion.”⁴³

Although Congress would affirm the Corps’s jurisdiction over “all

34. *Wyo. Outdoor Council v. U.S. Army Corps of Eng’rs*, 351 F. Supp. 2d 1232, 1254 (D. Wyo. 2005) (“Unlike NEPA, which imposes only procedural requirements, the CWA imposes ‘substantive restrictions on agency action.’” (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1273–74 (10th Cir. 2004))).

35. *Id.*

36. *See Ohio Valley I*, 410 F. Supp. 2d 450, 453–55 (S.D.W. Va. 2004), *aff’d in part, vacated in part*, 429 F.3d 493 (4th Cir. 2005).

37. Michael Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 705 n.56 (1989) (quoting Dep’t of Army, Office of Chief of Engineers, Press Release (May 6, 1975)).

38. *See Army Corps I*, 990 F. Supp. 2d 9, 19 (D.D.C. 2013). “Individual permitting under Section 404(a) . . . involves site-specific documentation and analysis, public interest review, and formal determination.” *Ohio Valley I*, 410 F. Supp. 2d at 454.

39. *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

40. 392 F. Supp. 685 (D.D.C. 1975).

41. *Id.* at 686.

42. Federal Water Pollution Control Act, 33 U.S.C. § 1344(a) (2012).

43. Blumm & Zaleha, *supra* note 37, at 705 n.56 (quoting Dep’t of Army, Office of Chief of Engineers, Press Release (May 6, 1975)).

waters of the United States” in the Clean Water Act of 1977, it did seek to alleviate some of the Corps’s concerns through the addition of section 404(e), which permits the Corps to issue general permits.⁴⁴ General permits are a less burdensome alternative to individual permitting;⁴⁵ once issued, activities falling within the scope of a general permit ordinarily may proceed with “little, if any, delay or paperwork.”⁴⁶ However, per Army Corps regulations, the terms and conditions of some general permits require permittees to file pre-construction notice with the Corps.⁴⁷ For example, NWP 12, discussed in detail *infra*, requires a permittee to file pre-construction notice and seek Corps verification in seven situations, such as when “the utility line in waters of the United States . . . exceeds 500 feet.”⁴⁸ In such cases, the agency must verify, among other things, that the proposed project will cause only minimal environmental impacts.⁴⁹ The Corps may supplement a general permit with project-specific conditions “[t]o ensure that the activity complies with the terms and conditions of the NWP and that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal.”⁵⁰ In other words, while the CWA gives the Corps the ability to supplement its analysis with project-specific conditions, it does not require the Corps to do so. If the agency determines that a project cannot meet a general permit’s requirements, it will demand that the project proponent obtain an individual, rather than a general, permit.⁵¹

It may help to view the general permitting process as two stages. First, at the issuance stage, the Army Corps issues a general permit for similar projects that will result in minimal impacts on both an individual and cumulative basis. Second, if a general permit requires pre-construction notice, the Corps verifies that a now-specified project falls within the general permit’s scope and may add conditions to ensure minimal impacts. This Note refers to the second stage as the verification stage. Once the Corps verifies that a project satisfies the previously issued

44. *Ohio Valley I*, 410 F. Supp. 2d at 454–55.

45. *See id.* at 467.

46. 33 C.F.R. § 330.1(b)–(c) (2016); *Army Corps I*, 990 F. Supp. 2d 9, 20, 26 (D.D.C. 2013). “After determining that a discrete category of activities will have minimal adverse effects on the environment, the Corps need not individually review projects that fit into that category.” *Ohio Valley I*, 410 F. Supp. 2d at 467.

47. 33 C.F.R. § 330.1(d); *see also Army Corps I*, 990 F. Supp. 2d at 20.

48. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,272 (Feb. 21, 2012).

49. *See Army Corps II*, 803 F.3d 31, 39 (D.C. Cir. 2015).

50. 33 C.F.R. § 330.1(e)(2); *see also Army Corps II*, 803 F.3d at 39.

51. *Army Corps II*, 803 F.3d at 39.

NWP's requirements, a party may complete its project.

B. The National Environmental Policy Act

“NEPA requires the federal government to identify and assess in advance the likely environmental impact of its proposed actions, including its authorization or permitting of private actions.”⁵² At the statute’s heart is the requirement for publicly available environmental review of “proposed ‘major Federal actions significantly affecting the quality of the human environment.’”⁵³ The Army Corps must engage in NEPA analysis prior to granting an individual CWA permit and before issuing or reissuing a general CWA permit, both of which are major federal actions.⁵⁴

NEPA prohibits uninformed federal agency action⁵⁵ by “ensuring that (1) agency decisions include informed and careful consideration of environmental impact, and (2) agencies inform the public of that impact and enable interested persons to participate in deciding what projects agencies should approve and under what terms.”⁵⁶ To accomplish these twin aims, a federal agency must conduct an environmental analysis and must make that analysis available for public comment.⁵⁷ Public comment ensures “that the larger audience . . . can provide input as necessary to the agency making the relevant decisions.”⁵⁸ Ultimately, public comment assists the federal government in making informed decisions.⁵⁹

The Council on Environmental Quality—an executive body that interprets NEPA and establishes NEPA regulations⁶⁰—details the required scope of an agency’s analysis.⁶¹ Among other requirements, agencies must analyze “cumulative actions,” or actions that, when viewed with other proposed actions, “have cumulatively significant impacts and

52. *Id.* at 36 (citing *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004)).

53. *Id.* at 37 (quoting National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2012)). If an agency has discretion in approving a project, it must conduct environmental analysis under NEPA. *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (“The touchstone of whether NEPA applies is discretion.”).

54. *See Army Corps I*, 990 F. Supp. 2d 9, 19, 21 (D.D.C. 2013). Whether the Army Corps must engage in NEPA review at the verification stage is an issue discussed *infra*.

55. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

56. *Army Corps II*, 803 F.3d at 36–37 (citing *Pub. Citizen*, 541 U.S. at 768).

57. 42 U.S.C. § 4332; *see also Army Corps I*, 990 F. Supp. 2d at 18.

58. *Pub. Citizen*, 541 U.S. at 768–69 (internal quotations omitted).

59. *See id.*

60. *Bostick II*, 787 F.3d 1043, 1063 (10th Cir. 2015) (McHugh, J., concurring).

61. 40 C.F.R. § 1508.25 (2016).

should therefore be discussed in the same impact statement.”⁶² Cumulative impacts, or cumulative effects,⁶³ result “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”⁶⁴

Unlike the CWA’s substantive limitations for general permitting,⁶⁵ courts have interpreted NEPA to be solely procedural.⁶⁶ NEPA merely requires “federal agencies to take a ‘hard look’ at their proposed actions’ environmental consequences in advance of deciding whether and how to proceed.”⁶⁷ The statute does not mandate that an agency make its decision based on its environmental analysis; it “merely prohibits uninformed—rather than unwise—agency action.”⁶⁸ An agency can only make an informed decision after careful consideration of the potential environmental impact and the public’s comments.⁶⁹

C. *The CWA and NEPA: Intertwined Statutes with Separate Requirements*

The relationship between the CWA and NEPA, along with the similarity in the language of the two statutes, can lead to confusion.⁷⁰ The Army Corps must comply with NEPA before issuing an individual or general permit under section 404 of the CWA.⁷¹ The CWA requires the Corps to ensure that a nationwide permit will result in, among other

62. *Id.*

63. Effects and impacts as used in the CEQ regulations are synonymous. *Id.* § 1508.8. Thus, cumulative effects and cumulative impacts are the same thing and may result from cumulative actions. *See Alpine Lakes Protection Soc. v. U.S. Forest Service*, 838 F. Supp. 478, 483 (W.D. Wash. 1993) (explaining that cumulative actions are actions that have cumulative impacts, or cumulative effects, and should therefore be considered together).

64. 40 C.F.R. § 1508.7.

65. *See supra* text accompanying notes 33–35. The CWA “imposes ‘substantive restrictions on agency action.’” *Wyo. Outdoor Council v. U.S. Army Corps of Eng’rs*, 351 F. Supp. 2d 1232, 1254 (D. Wyo. 2005) (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1273–74 (10th Cir. 2004)). “[T]he CWA is clear that when the effect of a general permit will be more than minimal, either individually or cumulatively, the Corps cannot issue the permit.” *Id.*

66. *See Army Corps I*, 990 F. Supp. 2d 9, 18 (D.D.C. 2013).

67. *Army Corps II*, 803 F.3d 31, 37 (D.C. Cir. 2015) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989)).

68. *Id.* (quoting *Methow Valley*, 490 U.S. at 351).

69. *See id.* at 36–37 (citing *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004)).

70. *See, e.g., Bostick II*, 787 F.3d 1043, 1062–63 (10th Cir. 2015) (McHugh, J., concurring) (explaining that the Army Corps conflated its NEPA obligations with its CWA obligations).

71. *See Army Corps I*, 990 F. Supp. 2d at 26–27.

things, “only minimal cumulative adverse effect on the environment.”⁷² Meanwhile, NEPA regulations require the Corps “to consider all of the reasonably foreseeable . . . cumulative effects of [its] action.”⁷³ Accordingly, both statutes require some form of a cumulative-effects analysis.

One major difference between the two analyses is that while the NEPA analysis is merely procedural,⁷⁴ the CWA analysis is substantive.⁷⁵ The Corps will satisfy NEPA so long as it properly analyzes all reasonably foreseeable cumulative effects of its permitting action—NEPA does not require the Corps to choose the least impactful option.⁷⁶ However, the Corps’s burden is greater under the CWA; it may not issue a general permit unless future projects within the permit’s scope will result in minimal cumulative adverse effects.⁷⁷

The CWA and NEPA also differ on the scope of the required review. While CWA analysis is limited to the aquatic environment,⁷⁸ NEPA analysis is broader, encompassing the aquatic and non-aquatic environments.⁷⁹ In *Sierra Club, Inc. v. Bostick*,⁸⁰ Judge McHugh—addressing a challenge to the GC Pipeline—described what she saw as the Army Corps conflating its obligations under NEPA with its obligations under the CWA.⁸¹ Specifically, she expressed concern over the Corps limiting its NEPA analysis to a project’s impact on regulated waters.⁸² She explained that the regulations guiding the Corps’s general-permitting process specify that its CWA analysis is limited to an activity’s effect on the aquatic environment and therefore “may be properly limited to the *aquatic* impacts associated with the discharge of dredge and fill material.”⁸³ However, Judge McHugh further explained that the scope of its NEPA analysis is broader than its CWA analysis, extending beyond

72. Federal Water Pollution Control Act, 33 U.S.C. § 1344(e) (2012).

73. *Bostick II*, 787 F.3d at 1063 (McHugh, J., concurring); see also 40 C.F.R. §§ 1508.7, 1508.25 (2016).

74. See *supra* text accompanying notes 65–69.

75. See *supra* text accompanying notes 33–35.

76. See *supra* text accompanying notes 65–69.

77. See *supra* text accompanying notes 33–35.

78. See *Bostick II*, 787 F.3d at 1063 (McHugh, J., concurring).

79. See *id.*

80. 787 F.3d 1043 (10th Cir. 2015).

81. *Id.* at 1062–63 (McHugh, J., concurring).

82. *Id.*

83. *Id.* at 1063 (emphasis added).

the aquatic environment.⁸⁴

Other courts have “universally adopted” Judge McHugh’s understanding of the Corps’s NEPA obligations.⁸⁵ For example, in *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*,⁸⁶ the court held that the Corps may not limit its NEPA analysis to regulated waters.⁸⁷ In *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*,⁸⁸ the Tenth Circuit upheld the Corps’s decision to issue a CWA permit for the construction of a project because the Corps did not limit its NEPA analysis to the aquatic environment.⁸⁹ The court observed that the Corps’s NEPA analysis “considered both [the] direct and reasonably foreseeable indirect impacts to land use, air quality, noise, traffic, water quality, threatened and endangered species, and cultural resources.”⁹⁰ In *Save Our Sonoran, Inc. v. Flowers*,⁹¹ the Ninth Circuit upheld a preliminary injunction halting development of a gated community because the Corps only analyzed the project’s impact on regulated waters.⁹² The court highlighted the distinction between the Corps’s CWA analysis and its NEPA analysis:

Although the Corps’[s] permitting authority is limited to those aspects of a development that directly affect jurisdictional waters, it has responsibility under NEPA to analyze all of the environmental consequences of a project. *Put another way, while it is the development’s impact on jurisdictional waters that determines the scope of the Corps’[s] permitting authority, it is the impact of the permit on the environment at large that determines the Corps’[s] NEPA responsibility.* The Corps’[s] responsibility under NEPA to consider the environmental consequences of a permit extends even to environmental effects with no impact on jurisdictional waters at all.⁹³

Thus, before issuing or reissuing a general permit, the Corps must

84. *Id.*

85. *Id.* at 1064–65 (citing seven cases in support).

86. 351 F. Supp. 2d 1232 (D. Wyo. 2005).

87. *Id.* at 1240–43.

88. 702 F.3d 1156 (10th Cir. 2012).

89. *Bostick II*, 787 F.3d at 1063–64 (McHugh, J., concurring) (citing *Hillsdale Envtl. Loss Prevention, Inc.*, 702 F.3d at 1162–64, 1172–77).

90. *Id.* (quoting *Hillsdale Envtl. Loss Prevention, Inc.*, 702 F.3d at 1162–64, 1164 (internal quotations omitted)).

91. 408 F.3d 1113 (9th Cir. 2005).

92. *Id.* at 1117–18.

93. *Id.* at 1122 (emphasis added).

satisfy two separate but related requirements that turn on a proper analysis of cumulative effects.⁹⁴ Under NEPA, the Corps must complete an analysis of all reasonably foreseeable cumulative effects of the permit, and it may not limit this analysis to the aquatic environment.⁹⁵ If it properly accounts for the foreseeable effects, the Corps will satisfy NEPA's requirement of informed agency action—regardless of whether the cumulative effects are more than minimal.⁹⁶ Under the CWA, the Corps must ensure that all future projects within the general permit's scope will have only a minimal cumulative adverse effect on the aquatic environment.⁹⁷ If the agency cannot show that the future projects' cumulative adverse effect on regulated waters will be minimal, it may not issue the general permit and must individually permit the projects.⁹⁸ The CWA, in other words, prohibits the Army Corps from issuing general, nationwide permits that will more than minimally impact the aquatic environment.

II. NATIONWIDE PERMIT 12, THE GULF COAST PIPELINE, AND THE FLANAGAN SOUTH PIPELINE

The Army Corps has issued and reissued the CWA general permit known as NWP 12 for decades.⁹⁹ The Corps may issue a general permit only if the permitted activities (1) “are similar in nature,” (2) “will cause only minimal adverse environmental effects when performed separately,” and (3) “will have only minimal cumulative adverse effect on the environment.”¹⁰⁰ Reissued every five years,¹⁰¹ the 2012 version of NWP 12 was at the heart of the recent litigation over the GC and FS pipelines, both of which relied extensively on NWP 12—rather than individual permits—to receive federal approval.¹⁰²

The Corps may use NWP 12 to approve activities falling within the

94. See *Bostick II*, 787 F.3d at 1063 (McHugh, J., concurring).

95. See *id.*

96. See *supra* text accompanying notes 65–69.

97. See *Bostick II*, 787 F.3d at 1063 (McHugh, J., concurring).

98. See *supra* text accompanying notes 33–35.

99. *Bostick II*, 787 F.3d at 1068 (McHugh, J., concurring).

100. Federal Water Pollution Control Act, 33 U.S.C. § 1344(e) (2012).

101. See Army Corps I, 990 F. Supp. 2d 9, 20 (D.D.C. 2013) (“A general permit is valid for five years, and can be reissued for subsequent five-year periods.”).

102. See Army Corps II, 803 F.3d 31, 38–40 (D.C. Cir. 2015); *Bostick II*, 787 F.3d at 1051–55. The 2012 version of NWP 12, which existed from March 19, 2012 to March 19, 2017, was used to approve the GC and FS pipelines. See Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,184 (Feb. 21, 2012).

general permit's scope,¹⁰³ and the Corps defines NWP 12's scope broadly. Specifically, the general permit authorizes "the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than [half]-acre of waters of the United States for each single and complete project."¹⁰⁴ The definition of "utility lines" includes "any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose."¹⁰⁵ For linear utility-line projects, such as oil pipelines, the Corps considers "each crossing of a water body at a separate and distant location" to be a "single and complete project."¹⁰⁶ Stated otherwise, depending on the number of water crossings, the Corps may consider one oil pipeline to consist of many separate projects, rather than viewing the pipeline itself as one project. In sum, to comply with NWP 12, the construction of an oil pipeline may not result in the loss of more than a half-acre of regulated water at any of the pipeline's "separate and distant" regulated-water crossings.¹⁰⁷

Although the Army Corps conducted CWA and NEPA¹⁰⁸ analyses when it reissued NWP 12 in 2012 (the issuance stage),¹⁰⁹ the agency left open the possibility of additional environmental review at the verification stage.¹¹⁰ The general permit requires a permittee to file pre-construction notice and seek Corps verification in seven situations, including when "the utility line in waters of the United States . . . exceeds 500 feet" and

103. *Army Corps I*, 990 F. Supp. 2d at 20, 26; 33 C.F.R. § 330.1(b)–(c) (2016).

104. Reissuance of Nationwide Permits, 77 Fed. Reg. at 10,271.

105. *Id.*

106. *Army Corps I*, 990 F. Supp. 2d at 21 (citing Reissuance of Nationwide Permits, 77 Fed. Reg. at 10,290). A "linear project" is "a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossing of one or more waterbodies at separate and distant locations." Reissuance of Nationwide Permits, 77 Fed. Reg. at 10,195. "Roads and pipelines are examples of linear projects." *Id.* at 10,263.

For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Id. at 10,290.

107. *Army Corps I*, 990 F. Supp. 2d at 21 (citing Reissuance of Nationwide Permits, 77 Fed. Reg. at 10,290).

108. The NEPA analysis resulted in a finding of no significant impact. Reissuance of Nationwide Permits, 77 Fed. Reg. at 10,269.

109. *Id.*

110. *Id.* at 10,196–97 ("[P]re-construction notification thresholds are necessary . . . to allow district engineers the opportunity to review those activities to determine whether they will result in minimal adverse effects on the aquatic environment.").

when “discharges . . . result in the loss of greater than 1/10-acre of [regulated waters].”¹¹¹

Despite being reissued for decades, oil companies historically did not use NWP 12 to approve major oil pipelines.¹¹² However, the GC and FS pipelines changed everything. TransCanada Corporation’s 485-mile¹¹³ GC Pipeline, which transports oil from Oklahoma to the Gulf Coast,¹¹⁴ relied on the permit for each of its 2,227 separate and distant water crossings.¹¹⁵ The FS Pipeline, which carries oil 593 miles from Illinois to Oklahoma,¹¹⁶ relied on the same permit 1,950 times.¹¹⁷ The GC and FS pipelines thus provided a novel situation. Rather than individually permitting each pipeline—which, since the pipelines cross regulated waters, would have required environmental review of the entire projects—the Army Corps used NWP 12 to approve each of the pipelines’ separate and distant crossings. Put bluntly, this use of NWP 12 allowed the Corps to evade whole-pipeline review.

III. THE TENTH AND D.C. CIRCUITS REJECT CHALLENGES TO THE ARMY CORPS’S USE OF NWP 12 TO APPROVE OIL PIPELINES.

In January 2014,¹¹⁸ the GC Pipeline began transporting oil from Oklahoma to the Gulf Coast.¹¹⁹ Prior to this, three groups, including the

111. 77 Fed. Reg. at 10,272 (requiring pre-construction notice in the following situations: “(1) [t]he activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials”).

112. See Sierra Club et al., Comment Letter on the U.S. Army Corps of Engineers’ Proposal to Reissue and Modify Nationwide Permit 12, No. COE-2015-0017, at 1 (Aug. 1, 2016), https://www.nwf.org/~media/PDFs/Global-Warming/Tar-Sands/NWP-12-Comments_FINAL_080116.ashx [http://perma.cc/L6LG-LL84] [hereinafter NWP 12: Public Comments].

113. *Bostick II*, 787 F.3d 1043, 1046 (10th Cir. 2015).

114. *Bostick I*, 539 F. App’x 885, 887 (10th Cir. 2013).

115. *Id.* at 901 (Martínez, J., dissenting).

116. *Army Corps II*, 803 F.3d 31, 33–34 (D.C. Cir. 2015).

117. *Id.* at 38.

118. Bill Chappell, *Keystone Pipeline’s Southern Section Begins Delivering Oil to Gulf Coast*, NPR (Jan. 22, 2014, 9:05 PM), <http://www.npr.org/sections/I-way/2014/01/22/265076621/keystone-pipeline-s-southern-section-begins-delivering-oil-to-gulf-coast> [http://perma.cc/MB5Y-KMEQ].

119. *Bostick I*, 539 F. App’x at 887.

Sierra Club, sued the federal government, challenging the Army Corps's NEPA analysis of NWP 12 at both the issuance and verification stage.¹²⁰ The environmental groups also challenged the Army Corps's use of NWP 12 to approve the pipeline, arguing that the Corps failed to ensure minimal cumulative adverse effects.¹²¹ In *Sierra Club, Inc. v. Bostick*, the Tenth Circuit ruled in favor of the federal government.¹²²

The FS Pipeline carries oil 593 miles from Illinois to Oklahoma.¹²³ The Sierra Club sued the federal government as soon as Enbridge Pipelines began constructing the oil pipeline in 2013.¹²⁴ The Sierra Club made several arguments, attacking the government's failure "to analyze and invite public comment on the environmental impact of the whole pipeline under NEPA" and criticizing the Army Corps's use of NWP 12 in the approval process.¹²⁵ In *Sierra Club, Inc. v. U.S. Army Corps of Engineers*,¹²⁶ the D.C. Circuit rejected the Sierra Club's arguments, approving the Army Corps's use of NWP 12 and holding "that the federal government was not required to conduct NEPA analysis of the entirety of the Flanagan South [P]ipeline."¹²⁷

Environmental groups focused their litigation on the CWA and NEPA. The two statutes require the Army Corps to complete separate but related analyses before reissuing NWP 12.¹²⁸ However, the Corps argued that it was too difficult to complete its analysis before, for example, oil companies proposed a specific oil pipeline.¹²⁹ The agency contended that the difficulty arose because of the scope of nationwide permits, which entities may use to "authorize activities across the nation . . . in a wide variety of environmental settings."¹³⁰ The Army Corps further argued that this difficulty allowed it to push some of its analysis to the verification stage—as opposed to the issuance stage when most environmental

120. *See id.* at 887–88.

121. *Bostick II*, 787 F.3d 1043, 1046–47 (10th Cir. 2015).

122. *Id.* at 1047.

123. *Army Corps II*, 803 F.3d 31, 33–34 (D.C. Cir. 2015).

124. *Id.* at 34.

125. *Id.*

126. 803 F.3d 31 (D.C. Cir. 2015).

127. *Id.* at 34.

128. *See supra* section I.C.

129. *See, e.g., Bostick II*, 787 F.3d 1043, 1058 (10th Cir. 2015) (outlining the Army Corps's argument).

130. *Id.* (quoting Plaintiffs-Appellants' Opening Brief at 528, *Bostick II*, 787 F.3d 1043 (No. 14-6099)).

analysis traditionally occurs.¹³¹ In fact, for both the GC and FS pipelines, the Corps only considered the cumulative impact of each pipeline's stream crossings in a single review at the verification stage,¹³² if at all.¹³³ By that point, the public had no remaining opportunity to comment.¹³⁴

A major issue, then, is whether the law permits the Army Corps to defer any of its NEPA or CWA analysis, and if it does, which parts it may legally defer. The Tenth Circuit held that the Corps may partially defer its CWA analysis to the verification stage.¹³⁵ The Tenth and D.C. Circuits held that no NEPA analysis is required at the verification stage.¹³⁶ Judge McHugh's concurrence in the Tenth Circuit went a step further, arguing that the Army Corps may not conduct additional NEPA review at the verification stage; instead, the Corps must complete all NEPA review at the issuance stage.¹³⁷

A second issue is whether the Army Corps's CWA and NEPA analyses sufficiently scrutinized NWP 12's cumulative effects, regardless of whether the analyses occurred at the issuance or verification stage.¹³⁸ The Tenth and D.C. Circuits in the GC and FS pipeline litigation upheld the CWA analysis.¹³⁹ However, both Circuits strongly questioned the sufficiency of the NEPA analysis but did not rule either way because the issue was not properly before them.¹⁴⁰

131. *See id.* at 1058–60.

132. *See id.* at 1061 (noting that “the record shows that district engineers analyzed the cumulative impacts of the proposed crossings” at the verification stage).

133. *See Army Corps II*, 803 F.3d 31, 33–34, 52 (D.C. Cir. 2015) (noting that NWP 12 permits the Corps to evaluate cumulative effects *on a regional basis*, suggesting that all the crossings were never analyzed together).

134. *Cf. Bostick II*, 787 F.3d at 1060 (arguing that “partial deferral would not restrict the public’s ability to comment on proposed permits” because the public has an opportunity to comment at the issuance stage); *see also infra* section IV.B.

135. *Bostick II*, 787 F.3d at 1051, 1056.

136. *Id.* at 1052–54; *Army Corps I*, 990 F. Supp. 2d 9, 26–27 (D.D.C. 2013).

137. *See Bostick II*, 787 F.3d at 1067 (McHugh, J., concurring).

138. *See, e.g., id.* at 1060–61 (majority opinion) (rejecting arguments that the Army Corps’s analysis was deficient).

139. *Id.*; *see also Army Corps II*, 803 F.3d 31, 52–53 (D.C. Cir. 2015).

140. *Army Corps II*, 803 F.3d at 40 n.3 (“To the extent that the Corps . . . understood its NEPA obligations as confined to considering environmental effects on CWA jurisdictional waters, its view misapprehends the obligations of any agency taking action subject to NEPA to do a comprehensive analysis of all types of foreseeable environmental effects.”); *Bostick II*, 787 F.3d at 1051 n.8 (“In her thoughtful concurrence, Judge McHugh concludes that it would have been obvious to the Corps that its analysis of cumulative effects was too restrictive. In our view, however, the environmental groups did not invoke the obviousness exception on the NEPA claims involving cumulative effects.”).

A. *Courts Allow the Army Corps to Partially Defer Its CWA Analysis to the Verification Stage, but They Do Not Require Additional NEPA Review at that Stage*

Courts have allowed the Army Corps to defer a portion of its CWA analysis to the verification stage.¹⁴¹ In such cases, courts do not require the Corps to supplement its deferred analysis with additional NEPA review.¹⁴² This limits the public’s ability to comment on proposed projects.¹⁴³ Relatedly, it limits the agency’s ability to fully analyze the cumulative environmental impacts of projects falling within NWP 12’s scope.¹⁴⁴

1. *Courts Allow the Corps to Partially Defer Its CWA Analysis*

The CWA allows the Corps to issue a general permit only if the permitted activities “will cause only minimal adverse environmental effects when performed separately,” and “will have only minimal cumulative adverse effect on the environment.”¹⁴⁵ Per Army Corps regulations, some general permits require the Army Corps to verify that an individual project falls within the permit’s scope.¹⁴⁶ Environmental groups have sued the Army Corps for conducting CWA review while verifying a project, as they believe the CWA requires the agency to complete all review at the issuance stage.¹⁴⁷

In the GC Pipeline litigation, the Tenth Circuit rejected the plaintiffs’ argument that the Army Corps violated the CWA because it improperly deferred a portion of its required environmental analysis to the verification stage.¹⁴⁸ In so holding, the court employed the two-step *Chevron* test.¹⁴⁹ Under the test, first laid out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a court first looks to see if Congress directly spoke

141. See *infra* section III.A.1.

142. See, e.g., *Bostick II*, 787 F.3d at 1052–54; Army Corps I, 990 F. Supp. 2d 9, 26–27 (D.D.C. 2013).

143. See *Ohio Valley I*, 410 F. Supp. 2d 450, 468 (S.D.W. Va. 2004) (“NWP 21 eliminates public involvement in decision-making at a stage where meaningful input in the minimal impact determination is possible.”), *aff’d in part, vacated in part*, 429 F.3d 493 (4th Cir. 2005).

144. See *Bostick II*, 787 F.3d at 1067 (McHugh, J., concurring).

145. Federal Water Pollution Control Act, 33 U.S.C. § 1344(e) (2012).

146. See *supra* text accompanying notes 47–51.

147. See, e.g., *Bostick II*, 787 F.3d at 1051, 1056 (rejecting arguments that the Army Corps may not partially defer its analysis).

148. *Id.*

149. *Id.* (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

on the issue.¹⁵⁰ To do so, courts “employ[] traditional tools of statutory construction.”¹⁵¹ “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁵²

If the intent of Congress is not clear, the court determines whether the agency’s interpretation of the law is acceptable, and if it is, the court will defer to the agency.¹⁵³ Because the Tenth Circuit in *Bostick* found that Congress had not directly answered whether the Corps may defer the cumulative effects analysis under the CWA, it proceeded to step two of the *Chevron* test.¹⁵⁴ The court ultimately concluded that the Army Corps permissibly interpreted the CWA as allowing the agency to defer its analysis.¹⁵⁵ A decade earlier, a federal district court in West Virginia had held that the Army Corps’s interpretation was unacceptable, only to be overruled by the Fourth Circuit the following year.¹⁵⁶ Understanding this prior litigation is key to understanding the Tenth Circuit’s decision in the GC Pipeline litigation, as well as the broader debate.

a. *Nationwide Permit 21 and the Origins of CWA Deferral*

The West Virginia case, *Ohio Valley Environmental Coalition v. Bulen*,¹⁵⁷ involved Nationwide Permit 21 (NWP 21), a permit comparable to NWP 12.¹⁵⁸ Like NWP 12, the version of NWP 21 at issue in *Ohio Valley* required pre-construction notice¹⁵⁹ and Army Corps verification.¹⁶⁰

150. *Bostick II*, 787 F.3d at 1056 (citing *Chevron*, 467 U.S. at 843–44).

151. *Chevron*, 467 U.S. at 843 n.9.

152. *Id.* at 842–43.

153. *Bostick II*, 787 F.3d at 1056–57 (citing *Chevron*, 467 U.S. at 843–44).

154. *Id.* at 1057.

155. *Id.* at 1057–60.

156. *See* *Ohio Valley Env'tl. Coal. v. Bulen (Ohio Valley II)*, 429 F.3d 493, 501 (4th Cir. 2005).

157. 410 F. Supp. 2d 450 (S.D.W. Va. 2004), *aff'd in part, vacated in part*, 429 F.3d 493 (4th Cir. 2005).

158. NWP 21 authorizes discharges “associated with surface coal mining and reclamation operations . . .” *Ohio Valley I*, 410 F. Supp. 2d at 455 (citing Issuance of Nationwide Permits; Notice, 67 Fed. Reg. 2020, 2081 (Jan. 15, 2002)).

159. *Compare* Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,272 (Feb. 21, 2012) (NWP 12 requires pre-construction notification in seven situations), *with* Issuance of Nationwide Permits; Notice, 67 Fed. Reg. at 2090 (NWP 21 requires pre-construction notification).

160. *Compare* *Army Corps II*, 803 F.3d 31, 39 (D.C. Cir. 2015) (in situations requiring pre-construction notice, the Corps must verify that the activity satisfies NWP 12’s conditions), *with* *Ohio Valley I*, 410 F. Supp. 2d at 455 (“The Corps must approve all NWP 21 projects before they can proceed to construction.”).

Unlike the Tenth Circuit in the GC Pipeline litigation,¹⁶¹ the district court in *Ohio Valley* found, under step one of *Chevron*, that “the [CWA] unambiguously requires determination of minimal impact before, not after, the issuance of a nation wide permit.”¹⁶² The court held that “[i]f the Corps cannot define a category of activities that will have minimal effects, absent individual review of each activity, the activities are inappropriate for general permitting.”¹⁶³ Thus, according to the district court, deferral is improper:

The issuance of a nationwide permit . . . functions as a guarantee ab initio that every instance of the permitted activity will meet the minimal impact standard. Congress intended for a potential discharger whose project fits into one of those categories to begin discharging with no further involvement from the Corps, no uncertainty, and no red tape.¹⁶⁴

The court supported its reading of the statute with legislative history,¹⁶⁵ including the following exchange between Senator Nunn and Senator Muskie, the co-sponsor of the 1972 Clean Water Act and floor manager of the Clean Water Act of 1977.¹⁶⁶ Given Senator Muskie’s role, the Fourth Circuit has given his comments “significant weight . . . in construing the Clean Water Act.”¹⁶⁷

Senator Nunn: I believe that general permits for dredge and fill activities can help eliminate lengthy delay and administrative red-tape. However, it is important that such general permits be drafted in a reasonable manner so as not to negate their usefulness. For example, the [C]orps’[s] proposed general permit for mining in Georgia contains a requirement that even though an activity is generally permitted, a person wishing to conduct such permitted activity must still give the [C]orps notice 45 days in advance of conducting the activity. The [C]orps then would have an unlimited time to approve or disapprove the activity. Thus, the [C]orps in essence is requiring activities to be individually permitted even though it purports to generally permit the activities

161. *Bostick II*, 787 F.3d 1043, 1060 (10th Cir. 2015).

162. *See Ohio Valley I*, 410 F. Supp. 2d at 465.

163. *Id.* at 467.

164. *Id.* at 465–66 (emphasis omitted).

165. The Supreme Court itself looked to legislative history in its original *Chevron* analysis. 467 U.S. 837, 862–64 (1984).

166. *Ohio Valley I*, 410 F. Supp. 2d at 468–69.

167. *Id.* at 469 (quoting *Champion Int’l Corp. v. EPA*, 850 F.2d 182, 188 (4th Cir. 1988)).

For general permits to be meaningful, it seems to me that once a general permit is obtained, it should authorize activities generally without separate approval being required before undertaking each such permitted activity. Am I correct that the general permits contemplated here are intended to grant permission to conduct activities without such separate approval from the [C]orps or a State each time that activity is to be conducted, or without any more than reasonable notice?

Senator Muskie: Yes; the Senator is correct.¹⁶⁸

Additionally, the *Ohio Valley* district court looked to comments made by Representative Ray Roberts, the chairman of the House committee responsible for the passage of the Clean Water Act of 1977.¹⁶⁹ Representative Roberts, on the day the Clean Water Act of 1977 passed the House,¹⁷⁰ stated:

While requiring some degree of notification of the proposed activity to the [C]orps may be reasonable, it would be unreasonable to require that the activity not be commenced until the [C]orps grants its consent. This would defeat the purpose of general permits which is to avoid individual applications and review.¹⁷¹

The court found Senator Muskie's and Representative Robert's comments indicative of Congress's express intent: "nationwide permits under Section 404(e) require a final determination of minimal environmental impact *before*, not *after*, issuance."¹⁷² Ultimately, the court held that a deferred, case-by-case analysis "defeats this clear purpose."¹⁷³

Before the Fourth Circuit ruled on appeal,¹⁷⁴ another district court cited the *Ohio Valley* district court decision approvingly,¹⁷⁵ and many believed the Fourth Circuit would affirm the district court's ruling.¹⁷⁶ But the

168. 4 CONG. RESEARCH SERV., LIBRARY OF CONG., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 1053–54 (1978) [hereinafter LEGISLATIVE HISTORY OF THE CWA].

169. See *Ohio Valley I*, 410 F. Supp. 2d at 469.

170. *Id.*

171. 3 LEGISLATIVE HISTORY OF THE CWA, *supra* note 168, at 349.

172. See *Ohio Valley I*, 410 F. Supp. 2d at 469 (emphasis in original).

173. *Id.*

174. *Ohio Valley II*, 429 F.3d 493 (4th Cir. 2005).

175. *Sierra Club, Inc. v. U.S. Army Corps of Eng'rs*, 399 F. Supp. 2d 1335, 1345–47 (M.D. Fla. 2005), *vacated by* 464 F. Supp. 2d 1171 (M.D. Fla. 2006).

176. Joseph Dawley, *Unintended Consequences: Clean Air Act's Acid Rain Program, Mountaintop Mining and Related Litigation*, TRENDS: ABA SEC. OF ENV'T, ENERGY, & RESOURCES NEWSL., Jan.–Feb. 2005, at 13 ("The practical effect of this ruling, which many believe will be affirmed on appeal, will be the requirement for individual permits that will trigger environmental review under the

Fourth Circuit overruled the district court in part, avoiding any discussion of legislative history.¹⁷⁷ Under *Chevron* step one, the court held that the CWA “is silent on the question whether the Corps may make its pre-issuance minimal impact determinations by relying in part on the fact that its post-issuance procedures will ensure that the authorized projects will have only minimal impacts.”¹⁷⁸ Under step two of *Chevron*, the Fourth Circuit found the Army Corps’s partial deferral entirely reasonable, noting the difficulty of predicting the impact of activities not yet identified.¹⁷⁹ Three judges dissented from the Fourth Circuit’s decision to deny rehearing en banc, arguing that the Corps’s pre-issuance CWA analysis came up short.¹⁸⁰

b. The Tenth Circuit Relied on the Fourth Circuit’s Ohio Valley Decision in Holding that the Army Corps May Partially Defer Its CWA Analysis

A decade after the *Ohio Valley* cases, both the Tenth Circuit in the GC Pipeline litigation and the D.C. Circuit in the FS Pipeline litigation cited the Fourth Circuit’s ruling approvingly.¹⁸¹ However, only the Tenth Circuit discussed CWA deferral in depth.¹⁸² In the GC Pipeline litigation, the Tenth Circuit explained that partially deferring the CWA analysis is reasonable, given the difficulty of anticipating impacts from all future projects that may fall within the scope of a general permit.¹⁸³ This difficulty is at its zenith for nationwide permits, the scope of which includes many projects taking place across the country.¹⁸⁴ For example, NWP 12 applies to utility lines, which may be used for a multitude of purposes, such as “carrying resources (like water, fuel, and electricity), facilitating communication (like telephone lines, internet connections, and

National Environmental Policy Act and the Endangered Species Act.”).

177. *See generally Ohio Valley II*, 429 F.3d 493.

178. *Id.* at 501; *see also id.* at 500 (“Neither the phrase ‘guarantee ab initio’ nor the phrase ‘initial certainty’ appears in section 404(e).” (emphasis omitted)).

179. *Id.* at 501–02.

180. *Ohio Valley Env’tl. Coal. v. Bulen*, 437 F.3d 421, 422–24 (4th Cir. 2006) (en banc) (King, J., dissenting).

181. *Army Corps II*, 803 F.3d 31, 39 (D.C. Cir. 2015); *Bostick II*, 787 F.3d 1043, 1058 (10th Cir. 2015) (“Though we are not bound by [*Ohio Valley II*], we regard it as persuasive.”).

182. Plaintiffs did not pursue a facial challenge to NWP 12 in the FS Pipeline litigation. *Army Corps I*, 990 F. Supp. 2d 9, 22 (D.D.C. 2013) (“Significantly, Plaintiffs have eschewed any facial challenge to NWP 12 itself.”).

183. *Bostick II*, 787 F.3d at 1058.

184. *Id.*

cable television), and removing waste.”¹⁸⁵ Because of the inherent difficulty of analyzing the cumulative effects of such a wide variety of potential projects, the court held that it was reasonable for the Army Corps to analyze only foreseeable effects at the issuance stage and to defer unforeseeable aspects to the verification stage. By the verification stage a proposing party will have specified its project, allowing the Corps to conduct a more precise analysis.¹⁸⁶

2. *Neither the Tenth nor the D.C. Circuits Require the Army Corps to Conduct Additional NEPA Review at the Verification Stage*

According to the Tenth and D.C. Circuits, the Army Corps is not required to conduct additional NEPA review at the verification stage.¹⁸⁷ In fact, requiring additional NEPA review at this later stage is incompatible with the streamlining nature of general permits.¹⁸⁸ Instead, courts have held that once the Corps issues a nationwide permit in compliance with NEPA, it has completed the requisite NEPA review; at the verification stage, the agency simply ensures compliance with the previously issued, extensively reviewed nationwide permit.¹⁸⁹

At least one judge has argued that the Army Corps *should* conduct additional NEPA review at the verification stage. During the GC Pipeline litigation, Judge Martínez argued in a dissenting opinion that, given “the number of permits issued by the Corps relative to the overall size of the Gulf Coast Pipeline,” it is “patently ludicrous” to allege that the Corps’s involvement at the verification stage does not require NEPA review.¹⁹⁰ Not only did Judge Martínez’s argument fail to persuade his fellow judges, his argument also failed to persuade the judges in the FS Pipeline litigation. There, the court found that the number of verifications per pipeline makes no difference:

By Plaintiffs’ logic, one construction project that requires 2,000 verifications for water crossings would be subject to further environmental review under NEPA, while 2,000 separate projects

185. *Id.*

186. *Id.* at 1058–63.

187. *See id.* at 1052–54; Army Corps II, 803 F.3d 31, 49–52 (D.C. Cir. 2015).

188. *See* Army Corps I, 990 F. Supp. 2d 9, 26–27 (D.D.C. 2013).

189. *See Bostick II*, 787 F.3d at 1054 (10th Cir. 2015); Army Corps I, 990 F. Supp. 2d at 27–27.

190. *Bostick I*, 539 F. App’x 885, 898–99 (10th Cir. 2013) (Martínez, J., dissenting from majority’s denial of plaintiffs’ request for a preliminary injunction). “The Gulf Coast Pipeline is 485 miles long, and required the Corps to issue 2,227 permits for water crossings. This means that the Gulf Coast Pipeline crosses United States waters almost five times in each mile, or about once every 1,150 feet.” *Id.* at 899.

that each require a single verification for a water crossing would not necessarily require additional review, despite the fact that both scenarios theoretically pose the same potential threat to the aquatic environment.¹⁹¹

The concept that the Army Corps does not have to conduct additional NEPA review at the verification stage appears to have won out. Although not expressly stated in the Tenth and D.C. Circuit opinions,¹⁹² the conclusion that the Army Corps need not conduct additional NEPA review during the verification stage implies that the Corps must complete all NEPA review during the issuance stage.¹⁹³ Additionally, Judge McHugh outlined in her concurrence two reasons why the Corps must complete all NEPA review at the earlier stage.

First, agencies must “complete their environmental analysis at the point of agency action.”¹⁹⁴ NEPA requires an agency to take a “hard look” at an action’s potential environmental impact before taking the action,¹⁹⁵ and this is impossible if the agency intentionally defers all or a portion of its analysis.¹⁹⁶ In *Defenders of Wildlife v. Ballard*,¹⁹⁷ plaintiffs sued the Corps, alleging that the agency failed to conduct a cumulative-effects analysis under NEPA for three nationwide permits.¹⁹⁸ The Corps’s stance was similar to the Tenth Circuit’s reasoning for allowing a partial deferral of the CWA analysis;¹⁹⁹ it argued that it is difficult to predict a nationwide permit’s potential impact because the impact depends on how often a nationwide permit is used in a specified geographic area.²⁰⁰ Therefore, the Corps continued, it is more sensible to conduct a cumulative-effects analysis under NEPA at a regional level.²⁰¹ However, the court found that the analysis was never completed; instead, any additional analysis was limited to a case-by-case assessment that failed to analyze the cumulative effects of the nationwide permit, under which thousands of projects could

191. *Army Corps I*, 990 F. Supp. 2d at 28 n.14.

192. *See generally Army Corps II*, 803 F.3d at 42; *Bostick II*, 787 F.3d at 1047.

193. *Cf. Bostick II*, 787 F.3d at 1067 (McHugh, J., concurring) (explaining why the Army Corps may not defer its NEPA analysis).

194. *See id.*

195. *Id.* (citing *Citizens’ Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1178 (10th Cir. 2008)).

196. *Id.*

197. 73 F. Supp. 2d 1094 (D. Ariz. 1999).

198. *Id.* at 1101.

199. *See supra* section III.A.1.b.

200. *Def. of Wildlife*, 73 F. Supp. 2d at 1106, 1115 (internal quotations omitted).

201. *Id.*

fall.²⁰² Although the Army Corps must assess the cumulative effects of all projects falling within a general permit's scope, the court observed that it was merely analyzing the cumulative effects of individual projects in isolation.²⁰³ While deferral may be helpful to analyze the cumulative effects *of individual projects*, it is not helpful to analyze the cumulative effects *of the nationwide permit itself*.²⁰⁴ Because the Army Corps must analyze the latter, the court held deferral improper.²⁰⁵

Similarly, in *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, the Corps argued that it deferred its NEPA analysis of a general permit because "it is impossible to know 'precisely what specific impacts might result until a particular project is proposed.'"²⁰⁶ Although the court acknowledged the inherent difficulty of predicting the cumulative effects of projects not yet proposed, it held that the difficulty does not excuse the Corps from analyzing foreseeable problems before issuing a nationwide permit.²⁰⁷ Like the *Defenders of Wildlife* court, it rejected the Corps's attempt to defer its analysis: "[b]y their very nature, the cumulative impacts of a general permit cannot be evaluated in the context of approval of a single project."²⁰⁸ Once again, a court noted that deferral is not helpful to analyze the cumulative effects *of the nationwide permit itself* and found the Corps's NEPA analysis deficient.²⁰⁹

Second, Judge McHugh argued that the Corps may not defer its NEPA analysis because of the strong possibility that the analysis will remain deferred for good.²¹⁰ She noted that in many situations where the Corps defers the NEPA analysis, neither it nor any other agency ever completes the analysis.²¹¹ Largely due to the lack of required federal oversight of oil pipeline construction—the Army Corps's jurisdiction is over regulated waters broadly, not oil pipelines specifically²¹²—domestic oil pipelines

202. *Id.* at 1112–13.

203. *See id.*

204. *See id.* at 1113 ("While Defendants' scope of analysis may be appropriate for a site-specific NWP authorization, it is inadequate to measure the impact of implementing the NWP program under which thousands of projects will be authorized.").

205. *See id.*

206. *Id.* at 1242 (quoting Respondent's Merits Brief at 39, *Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1254 (D. Wyo. 2005) (No. 02-CV-0155-D)).

207. *Id.* at 1243.

208. *Id.* (internal quotation marks omitted).

209. *See id.*

210. *See Bostick II*, 787 F.3d 1043, 1067 (10th Cir. 2015) (McHugh, J., concurring).

211. *See id.* ("[I]n the context of nationwide permits, it may well be that, as happened here, there is no lead agency that will conduct an environmental assessment.").

212. *See Army Corps I*, 990 F. Supp. 2d 9, 14 (D.D.C. 2013) ("Because Congress has not authorized

such as the GC and FS pipelines generally do not have a lead agency.²¹³ This results in no clear choice of agency to conduct further NEPA analysis.²¹⁴ Additionally, nationwide permits often allow activities to commence without Corps verification.²¹⁵ If pre-construction notice is not required, no additional NEPA analysis will ever be considered, and the deferred analysis will remain deferred for good.²¹⁶ Thus, the Corps must “fully evaluate all of the required NEPA factors *before* reissuing NWP 12.”²¹⁷

Although Judge McHugh raised concerns over the defects of the Army Corps’s deferral practice, she ultimately wrote in concurrence rather than dissent.²¹⁸ She did so because no commenter objected to the Corps’s deferral practice during the NEPA notice and comment period—even though “[t]he Corps has been issuing and reissuing NWP 12 for decades.”²¹⁹ Although some issues are “so obvious”²²⁰ that a commentator need not specifically object during notice and comment to preserve the issue for trial,²²¹ Judge McHugh did not believe the Corps’s deferral practice was one of those issues.²²² Although neither court expressly held that the Army Corps must complete its NEPA analysis at the issuance stage, Judge McHugh’s concurrence strongly suggests that the Corps may not defer.²²³

the federal government to oversee construction of a domestic oil pipeline, Plaintiffs’ complaint relies on a series of federal environmental laws and regulations that require federal agencies with some involvement in domestic pipeline construction to follow certain procedures.”).

213. See *Bostick II*, 787 F.3d at 1067 (McHugh, J., concurring).

214. See *id.*

215. *Id.*

216. *Id.*

217. *Id.* (emphasis in original).

218. *Id.* at 1067–68.

219. *Id.*

220. The court will usually not hear a plaintiff’s claim if the plaintiff failed to raise the issue during the NEPA notice-and-comment period; an exception to the rule is when the court deems the issue “so obvious” that raising the issue during notice and comment was unnecessary. *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 764–65 (2004).

221. *Id.* at 765. For example, Judge McHugh believed that the Corps’s failure to consider environmental effects outside the aquatic environment was so obvious that no commenter needed to raise the argument. *Bostick II*, 787 F.3d at 1065 (McHugh, J., concurring).

222. *Id.* at 1067–68.

223. See *id.* at 1067. In its 2017 reissuance of NWP 12, the Army Corps stated it does not defer its NEPA analysis. *Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 1,860, 1,891 (Jan. 6, 2017).

B. *The Courts Approved the Army Corps's CWA Analysis While Strongly Questioning the Agency's NEPA Analysis*

In addition to allowing the Corps to partially defer its CWA analysis, the Tenth and D.C. Circuits approved the sufficiency of the partially deferred analysis. The Tenth Circuit held that the Corps's verification of the GC Pipeline was not arbitrary or capricious, in part because it could "reasonably discern that the agency analyzed the cumulative impacts of the proposed crossings" at the verification stage.²²⁴ For example, the court noted that the agency "prepared verification memoranda that describe the Corps'[s] analysis of pipeline impacts."²²⁵ The D.C. Circuit reached a similar conclusion, holding that the Army Corps's conclusions were "made at the end of a lengthy memorandum explaining, among other things, the details concerning the scope of the proposed project in each respective district, [and] the expected effect of the project on [regulated] waters."²²⁶

The courts were not as satisfied with the Army Corps's NEPA analysis, but neither court ruled on the issue. Judge McHugh explained that, in her view, the Army Corps's NEPA analysis was insufficient because it improperly limited the analysis to the aquatic environment.²²⁷ The Tenth and D.C. Circuits referred to Judge McHugh's analysis as "thoughtful."²²⁸ However, the Tenth Circuit held the argument waived,²²⁹ and the Sierra Club did not raise the issue in the D.C. Circuit.²³⁰

224. *Bostick II*, 787 F.3d at 1060–61; *see also* Army Corps II, 803 F.3d 31, 52–53 (D.C. Cir. 2015). In the litigation over the GC and FS pipelines, the courts reviewed plaintiffs' NEPA and CWA challenges under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706 (2012). *Army Corps II*, 803 F.3d at 42; *Bostick II*, 787 F.3d at 1047. Under the APA, courts will overturn an agency action if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Bostick II*, 787 F.3d at 1047. Generally, a court will uphold an agency's action if the agency made a reasonable choice based on the relevant factors and alternatives. *Bostick II*, 787 F.3d at 1047 (citing *Mt. Evans Co. v. Madigan*, 14 F.3d 1444, 1453 (10th Cir. 1994)).

225. *Bostick II*, 787 F.3d at 1061. The court rejected the environmental groups' argument that the memoranda were deficient, deferring to the trial court's holding that the groups waived the argument by failing to properly raise it. *Id.* at 1061 n.19.

226. *Army Corps II*, 803 F.3d at 52–53 (citing *Sierra Club, Inc. v. U.S. Army Corps of Eng'rs*, 64 F. Supp. 3d 128, 157 (D.D.C. 2014), *aff'd*, 803 F.3d 31 (D.C. Cir. 2015)).

227. *See supra* section I.C.

228. *Army Corps II*, 803 F.3d at 40 n.3; *Bostick II*, 787 F.3d at 1051 n.8.

229. *Bostick II*, 787 F.3d at 1051 n.8.

230. *Army Corps II*, 803 F.3d at 39–40.

IV. COURTS SHOULD NOT ALLOW THE ARMY CORPS TO DEFER ANY OF ITS ANALYSIS

The Tenth and D.C. Circuits have so far upheld the use of NWP 12 as a tool for approving domestic oil pipelines,²³¹ and their decisions have shed light on the Corps's separate but related CWA and NEPA analyses.²³² The Tenth Circuit followed Fourth Circuit precedent allowing a partially deferred CWA analysis under *Chevron* deference.²³³ Despite the Tenth Circuit's opinion, partially deferring the CWA analysis violates the CWA's text, structure, purpose, and legislative history, which reveals that the Army Corps must complete all analysis before issuing a permit. Moreover, deferral unacceptably allows the Corps to avoid the combined effect of NEPA and the CWA, limiting the public's ability to comment. Therefore, Army Corps regulations allowing partial deferral fail under *Chevron* step one. Courts should reject recent precedent and reconcile general permitting with the CWA's plain meaning.

A. *The CWA Is Clear: The Army Corps May Not Defer Its Analysis*

The Army Corps must approve projects falling within the scope of a general permit without additional review. The CWA's objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²³⁴ Under the CWA's plain language, the agency may not issue a general permit unless it can show that the permit's cumulative adverse effect on regulated waters will be minimal.²³⁵ If the Army Corps can show that the permit will have a minimal adverse effect, it may issue the permit, and all projects falling within the permit's scope may proceed without further analysis.²³⁶ Because the agency must show minimal effects at the issuance stage,²³⁷ additional analysis at the verification stage is unnecessary. In other words, if the Army Corps satisfies its CWA

231. *See id.* at 33–35; *Bostick II*, 787 F.3d at 1061.

232. *See supra* section I.C.

233. *See supra* section III.A.1.b.

234. Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2012).

235. *Id.* § 1344(e)(1) ("Secretary may . . . issue general permits . . . for any category of activities . . . if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."); *see also* Julia Fuschino, Note, *Mountaintop Coal Mining and the Clean Water Act: The Fight Over Nationwide Permit 21*, 34 B.C. ENVTL. AFF. L. REV. 179, 203–05 (2007); *supra* text accompanying notes 33–35.

236. *See supra* section I.A.

237. *See supra* text accompanying notes 33–35.

responsibility by properly analyzing the permit's potential effects at the issuance stage, it will not have any analysis left to complete at the verification stage. If the Army Corps cannot satisfy the CWA's general-permitting requirements, it is not out of options. The same section of the CWA providing for general permitting also provides for individual permitting.²³⁸ Thus, the CWA directly speaks against deferral. If the Army Corps cannot satisfy the CWA's general-permitting provisions at the issuance stage, the answer is not deferral; rather, it must proceed with permitting on an individual basis.

Additionally, the circumstances in which Congress created the general-permitting option suggest that it intended general permitting to obviate potentially burdensome individual review only for small projects.²³⁹ Before general permits, the Army Corps expressed concern over having to individually permit too many projects. After the *Callaway* court broadly defined the Corps's jurisdiction,²⁴⁰ the agency argued the decision would require it to issue an individual permit to, for example, a rancher hoping to enlarge her stock pond, a farmer desiring to deepen his irrigation ditch or plow a field, or a mountaineer wanting to protect her land from stream erosion.²⁴¹ Noticeably absent from this list is the oil tycoon hoping to profit from a massive, interstate pipeline that will cross thousands of regulated waters. The concern was that the Army Corps's broad jurisdiction required individual permitting of small projects, which the agency viewed as an unnecessary waste of time. In creating a general-permitting alternative, Congress sought to alleviate some of the Corps's concerns.²⁴²

Finally, the legislative history of general permitting suggests that the Army Corps may not defer its CWA analysis. Senator Muskie, influential in the legislation adding the general permitting option to the CWA, confirmed that once issued, general permits do not require the Army Corps to separately approve each project falling within the permit's scope.²⁴³ Representative Roberts, also influential in the legislation adding the general permitting option to the CWA, added that requiring the Army Corps to approve each separate project "would be unreasonable" and

238. See 33 U.S.C. § 1344(a), (e).

239. See *supra* text accompanying notes 36–45.

240. See *supra* text accompanying notes 36–43.

241. *Ohio Valley I*, 410 F. Supp. 2d 450, 454 (S.D.W. Va. 2004) (citing Blumm & Zaleha, *supra* note 37, at 705 n.56), *aff'd in part, vacated in part*, 429 F.3d 493 (4th Cir. 2005).

242. *Id.* at 454–55.

243. 4 LEGISLATIVE HISTORY OF THE CWA, *supra* note 168, at 1053–54.

“would defeat the purpose of general permits.”²⁴⁴ The district court in *Ohio Valley* relied in part on this legislative history in holding that the Army Corps may not defer its CWA analysis.²⁴⁵ The Fourth Circuit reversed, but it did not mention any legislative history in its opinion.²⁴⁶ Instead, the circuit court held that the CWA permits deferral, noting the difficulty of predicting the environmental impact of yet-to-be-identified projects.²⁴⁷ The court also noted that the CWA does not explicitly prohibit the Army Corps from relying on a to-be-completed analysis at the issuance stage.²⁴⁸ However, as just articulated, the CWA *does* explicitly prohibit deferral.²⁴⁹ Unfortunately, the Tenth Circuit relied on the Fourth Circuit’s holding in conducting its own *Chevron* analysis,²⁵⁰ similarly failing to examine the legislative history.²⁵¹

In sum, any review beyond a simple verification—a mere affirmation that the project falls within the general permit’s scope—violates the streamlining nature of the permits and blurs the line between general and individual permits. By allowing the Corps to defer a general permit’s unforeseeable effects to the verification stage,²⁵² courts are allowing more than a simple verification. They are allowing the Army Corps to *analyze* and then verify. However, the CWA sets a high bar: prior to issuance, the Corps must prove that the permit will result in minimal adverse environmental effects, both individually and cumulatively.²⁵³ If it cannot prove minimal adverse effects, it may not issue the general permit. Without a general permit, the Army Corps must individually permit proposed projects such as oil pipelines—requiring whole-project environmental review.

B. The CWA Must Remain Coupled with Its NEPA Counterpart to Provide the Public with an Opportunity to Comment

NEPA provides the public with an opportunity to comment on

244. *Id.* at 349.

245. *Ohio Valley I*, 410 F. Supp. 2d at 465.

246. *See generally* *Ohio Valley II*, 429 F.3d 493 (4th Cir. 2005).

247. *Id.* at 501.

248. *See id.*

249. *See supra* text accompanying notes 235–23838.

250. *Bostick II*, 787 F.3d 1043, 1058 (10th Cir. 2015).

251. *See generally id.*

252. *Bostick II*, 787 F.3d at 1058–60.

253. Federal Water Pollution Control Act, 33 U.S.C. § 1344(e) (2012).

proposed projects.²⁵⁴ When permitting an individual project, the Army Corps has no opportunity to defer either its CWA or NEPA analysis to a verification stage, as there is no verification stage. Thus, the CWA and NEPA necessarily work together, providing the public an opportunity to comment before the Army Corps may grant the permit. Public comment is critical; NEPA's requirement for a public comment period reflects its importance. Public comment ensures "that the larger audience . . . can provide input as necessary to the agency making the relevant decisions,"²⁵⁵ and it assists the federal government in making informed decisions.²⁵⁶ General permits inappropriately change the calculus by limiting the opportunity for public comment to the issuance stage—despite additional review taking place at the verification stage.

Courts have allowed the Army Corps to partially defer its CWA analysis of general permits to the verification stage²⁵⁷ while not requiring additional NEPA review.²⁵⁸ The Army Corps's issuance of a general permit is a major federal action, triggering NEPA.²⁵⁹ However, NEPA review is absent from the deferred portion of the Corps's CWA analysis. This effectively limits public comment to the issuance stage, at which time entities have yet to specify any projects. In other words, the public is left to comment on unspecified, abstract projects. It also creates an inappropriate double standard. On one hand, courts allow a deferred CWA analysis because of the inherent difficulty of predicting future projects at the issuance stage.²⁶⁰ On the other, courts limit the public's ability to comment to this same, abstract stage. This impediment to public comment is one reason the district court in *Ohio Valley* found CWA deferral inappropriate;²⁶¹ the court observed that CWA deferral "eliminates public involvement in decision-making at a stage where meaningful input in the minimal impact determination is possible."²⁶²

To appropriately give effect to NEPA's public-comment requirement,

254. National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2012); Army Corps I, 990 F. Supp. 2d 9, 18 (D.D.C. 2013).

255. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768–69 (2004) (internal quotations omitted).

256. *See id.*

257. *See supra* section III.A.1.

258. *See supra* section III.A.2.

259. *See Army Corps I*, 990 F. Supp. 2d at 19, 21.

260. *See Bostick II*, 787 F.3d 1043, 1058–60 (10th Cir. 2015). Moreover, Judge McHugh persuasively argued that the Corps must complete its NEPA analysis at the issuance stage. *See supra* section III.A.2.

261. *Ohio Valley I*, 410 F. Supp. 2d 450, 468 (S.D.W. Va. 2004), *aff'd in part, vacated in part*, 429 F.3d 493 (4th Cir. 2005).

262. *Id.*

the Army Corps must tether all CWA analysis to NEPA analysis. Untethering the two analyses is incompatible with NEPA's public-comment mandate. The Corps has two options: (1) conduct NEPA review at the verification stage, or (2) stop partially deferring its CWA analysis. The first option cannot be squared with recent judicial precedent,²⁶³ nor can it be squared with the CWA's streamlining nature.²⁶⁴ Thus, to provide adequate opportunity for public comment, the Army Corps must complete its entire CWA and NEPA analyses at the issuance stage. If it is impossible to do so, the agency must turn to individual permitting.

C. Courts Should Not Excuse Compliance with the CWA Simply Because Compliance Is Difficult

The Fourth and Tenth Circuits' reasoning for allowing partial CWA deferral—the “inherent difficulty” of predicting future projects—cannot overcome the CWA's plain language. Moreover, the reasoning is at odds with other courts' reasoning for disallowing NEPA deferral. For example, in *Defenders of Wildlife* and *Wyoming Outdoor Council*, the courts observed that while a deferred NEPA analysis would provide the Army Corps an opportunity to scrutinize an *individual project's* cumulative effects, NEPA demands an analysis of the *general permit's* cumulative effects.²⁶⁵ For example, if the Army Corps estimated that it would use NWP 12 to approve ten oil pipelines, it must analyze the cumulative effects of all ten before issuing the permit. Waiting for an oil company to propose one specific pipeline may make a cumulative effects analysis easier for that one pipeline. But it will not ease the Army Corps's burden of analyzing the cumulative effects of all ten. “By their very nature, the ‘cumulative impacts’ of a general permit cannot be evaluated in the context of approval of a single project.”²⁶⁶

The same can be said of the Army Corps's CWA analysis. The agency must ensure that the cumulative effects of *all projects within the permit's scope* will minimally impact the environment. Conducting this analysis piece-by-piece in the context of individual projects is difficult—maybe impossible. Judge McHugh acknowledged that “accounting in advance for the broad range of possible impacts resulting from the wide variety of

263. See *supra* section III.A.2.

264. See *supra* section IV.A.

265. See *supra* text accompanying notes 194–209.

266. *Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1243 (D. Wyo. 2005).

utility lines authorized under NWP 12 is a daunting task.”²⁶⁷ But she also noted that “compliance with NEPA is not excused simply because compliance is difficult.”²⁶⁸ The same could—indeed, should—be said for compliance with the CWA.

The strong circuit precedent creates a substantial hurdle for environmental groups to overcome when arguing that deferral violates the CWA, but the groups should nevertheless challenge the Army Corps’s deferred CWA analysis. The groups should do so by challenging prior courts’ application of *Chevron*. As the window to prevent climate change’s worst effects closes,²⁶⁹ environmentalists must seek to revive the *Ohio Valley* district court’s analysis, which properly construes the CWA and leads to acceptable results based on sound reasoning.

V. REISSUANCE OF NWP 12: THE ARMY CORPS ADDRESSES MANY, BUT NOT ALL, PROBLEMS

The 2012 version of NWP 12 was set to expire on March 18, 2017,²⁷⁰ as general permits expire every five years.²⁷¹ However, on January 6, 2017, the Army Corps reissued NWP 12 for another five years.²⁷² As required, the agency conducted CWA and NEPA review before reissuing the general permit.²⁷³ NEPA review provided environmental groups an opportunity to comment on the reissuance.

Armed with Judge McHugh’s concurrence, the groups commented that the Army Corps’s NEPA review was inadequate.²⁷⁴ However, the agency analyzed the cumulative effects of oil pipelines²⁷⁵ and did not limit its

267. *Bostick II*, 787 F.3d 1043, 1066 (10th Cir. 2015) (McHugh, J., concurring).

268. *Id.*

269. *See supra* notes 1–5 and accompanying text.

270. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,184 (Feb. 21, 2012).

271. Federal Water Pollution Control Act, 33 U.S.C. § 1344(e)(2) (2012).

272. Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1,860, 1,860 (Jan. 6, 2017). The Trump administration exempted these permits from its early-2017 regulatory freeze. Justin Worland, *President Trump Kept This One Obama Regulation Because It Makes Approving Pipelines Easier*, TIME (Feb. 9, 2017), <http://time.com/4665432/nationwide-permits-dakota-access-pipeline/> [<http://perma.cc/9QQT-Z269>]. For more information on the regulatory freeze, see Memorandum from Reince Priebus, Assistant to the President and Chief of Staff, to the Heads of Exec. Dep’ts & Agencies (Jan. 20, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies> [<http://perma.cc/6ASY-TRCL>].

273. *See supra* section I.C.

274. NWP 12: Public Comments, *supra* note 112, at 19, 82–96.

275. U.S. ARMY CORPS OF ENG’RS, DECISION DOCUMENT: NATIONWIDE PERMIT 12, at 23 (2016) [hereinafter DECISION DOCUMENT 2016], http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_12_2017_final_Dec2016.pdf?ver=2017-01-06-125514-797 [<http://perma.cc/TU54-MLBC>]. Its analysis assumed the agency would use NWP 12 “approximately 11,500 times per year

NEPA analysis to the aquatic environment, which it had done during the 2012 reissuance.²⁷⁶ The Corps likely made this change because it was aware of Judge McHugh’s concurrence and the strong language from both the Tenth and D.C. Circuits calling its previous analysis into question.²⁷⁷ These changes are a step in the right direction and likely preclude challenges based on the adequacy of the Army Corps’s NEPA analysis.

However, the Army Corps’s changes did not preclude all potential challenges. Namely, environmental groups also brought attention to the improper deferral of CWA analysis during public comment on the reissuance of NWP 12²⁷⁸ and further argued that NEPA requires the Army Corps to provide opportunity for public comment during the verification stage of specific pipelines.²⁷⁹ The 2017 reissuance still allows the Corps to partially defer its CWA analysis. Specifically, the 2017 reissuance retained the requirement for pre-construction notice in specified situations because notice has “been effective in identifying proposed NWP 12 activities that should be reviewed by district engineers on a case-by-case basis to ensure that they result in only minimal individual and cumulative adverse environmental effects.”²⁸⁰ Thus, the argument remains valid that the Army Corps should not review individual projects that fall within the scope of NWP 12 on a case-by-case basis.²⁸¹ Instead, its CWA and NEPA analyses must be completed at the issuance stage.²⁸² Environmental groups should challenge the next oil pipeline approved through the use of NWP 12.

CONCLUSION

Environmental groups should challenge the current case law supporting the Army Corps’s use of NWP 12 to approve domestic oil pipelines. Although the Army Corps recently strengthened its analysis of NWP 12 to avoid future liability, the use of the general permit to approve domestic oil pipelines remains vulnerable to challenge in court. Specifically,

on a national basis, resulting in impacts to approximately 1,700 acres of waters.” *Id.* at 70.

276. Compare U.S. ARMY CORPS OF ENG’RS, DECISION DOCUMENT: NATIONWIDE PERMIT 12, at 23–28 (2012), http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf [<http://perma.cc/ZHH8-ZURS>] (limiting analysis to the aquatic environment), with DECISION DOCUMENT 2016, *supra* note 275, at 44–56 (2016) (broadening analysis to more than the aquatic environment).

277. See *supra* text accompanying notes 227–30.

278. NWP 12: Public Comments, *supra* note 112, at 19, 15–20.

279. Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1884 (Jan. 6, 2017).

280. *Id.* at 1888.

281. See *supra* Part IV.

282. See *supra* Part IV.

environmentalists should urge courts to conduct a new *Chevron* analysis of CWA deferral without relying on the Fourth Circuit's decision in *Ohio Valley*. The CWA is clear: the Army Corps may not partially defer its analysis of cumulative effects; instead, it must complete the analysis, along with its NEPA analysis, before issuing a general permit. Allowing deferral ignores the CWA's plain meaning and inappropriately limits the public's ability to comment as required by NEPA. If the Army Corps cannot prove minimal cumulative effects at the issuance stage, it may not issue a general permit and must individually permit projects instead. Judicial recognition of this argument will bring environmental review of oil pipelines into compliance with the CWA, strengthening review and improving the public's ability to comment—a major win in the battle for a cleaner environment.